Supreme Court, U.S.
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No. 97-851

In the Supreme Court of the United States

OCTOBER TERM, 1997

DIANNA LAWSON, ET VIR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Suits in Admiralty Act, 46 U.S.C. App. 741 *et seq.*, constitutes a waiver of the United States' sovereign immunity for discretionary functions.

2. Whether the Coast Guard's selection of navigational aids for a breakwater is a discretionary function.

3. Whether the Coast Guard's authority over the breakwater at issue was exclusive, or was shared with local government.

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OPINIONS BELOW

Neither the opinion of the court of appeals (Pet. App. 1a-13a) nor the opinion of the district court (Pet. App. 14a-24a) is reported. The two decisions of the magistrate judge (Pet. App. 26a-44a, 47a-57a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1997. The petition for a writ of certiorari was filed on November 21, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. At approximately 10 p.m. on a clear July night in 1990, petitioner David Lawson and his brother-in-law, Fred Rowe, left the dock at Lorain, Ohio, aboard Rowe's motorboat. The two men had spent the afternoon and evening at a friend's birthday party; they soon picked up David's wife Dianna Lawson, and Rowe's two-year-old daughter. The men then purchased beer, and headed for open water and a midnight ride on Lake Erie. Pet. App. 2a-3a.

To reach open water, the men had to maneuver around long cement breakwaters that flanked the entrance to Lorain Harbor. The last breakwater extended almost 2,150 feet along the coast and had navigation aids at either end—a sixty foot tower with a white rotating light on the breakwater's western end, and a 25 foot tower with a blinking yellow light on the eastern end. Although both lights were working, the boat crashed into the breakwater when the boat was about 540 feet from its east end. It is undisputed that David Lawson was piloting the boat at the time of the crash and that he had a blood alcohol level of .254 grams per deciliter, more than two and one half times the legal limit. Dianna Lawson was severely injured and was left a quadriplegic. Pet. App. 2a-3a.

2. Petitioners sued the United States under the Suits in Admiralty Act (SAA), 46 U.S.C. App. 741 *et seq.*, claiming that the Coast Guard had not properly marked the breakwater and that the existing light on the breakwater's west end was not in sound working order. They also sued the City of Lorain and the Lorain Port Authority (LPA), claiming that those

entities also failed to properly mark and maintain the breakwater. Pet. App. 4a.

The district court referred the case to a magistrate judge, who recommended a decision in favor of the United States on its motion to dismiss for lack of subject-matter jurisdiction. The magistrate judge concluded that petitioner's claims relating to the alleged failure of the Coast Guard to adequately design and install the breakwater, and its alleged failure to select the proper navigational aids, were barred by the discretionary function exception to liability. Pet. App. 48a-49a & n.1. With respect to the United States' subsequent motion for summary judgment on petitioners' claims that the Coast Guard had failed to properly maintain the navigational aids, which the court had held in an earlier ruling were not barred by the discretionary function exception, the magistrate judge determined that they lacked merit. The magistrate judge concluded that the breakwater's visual aids to navigation were adequately functioning at the time of the accident and that the only aid to navigation not functioning, a foghorn, would not have been used on the clear night of the accident. The magistrate judge also ruled that the Coast Guard had sole responsibility for the breakwater, and that neither the City of Lorain nor the LPA had a legal duty to control or maintain the structure. *Id.* at 35a. He thus recommended that the motions of the City and the LPA for summary judgment be granted. *Id.* at 38a.

The district court subsequently adopted the recommended decision of the magistrate judge, granting the United States' motion to dismiss on discretionary function grounds, and granting the motions for sum-

mary judgment filed by the United States, the City of Lorain, and the LPA. Pet. App. 14a-24a.

3. The court of appeals affirmed in a per curiam decision. Pet. App. 1a-13a. The court rejected petitioners' argument, made for the first time on appeal, that there is no discretionary function exception to liability under the Suits in Admiralty Act. The court concluded that "[e]xisting precedent in this circuit and most other circuits * * * has already decided this issue." *Id.* at 5a.

The court then ruled that the discretionary function exception clearly applied in this case. It noted that, under 14 U.S.C. 81, the Coast Guard "is not obligated to place lights at every coastal obstruction," but rather "may" establish aids to navigation. Pet. App. 6a. Moreover, "[b]ecause of the importance of navigational aids and the legal restrictions surrounding the placement of navigational aids," the court could "only conclude that the Coast Guard's authority over those aids is one of public policy." *Id.* at 7a. The court concluded that the decision to place only two navigational aids on the Lorain breakwater remained within the discretionary function exception, and it thus rejected petitioner's argument that the Coast Guard negligently failed to provide a sufficient number of navigational aids on the breakwater. *Id.* at 9a. The court also found no error in the factual determination by the district court that the navigational aids were working properly on the night of the accident. *Id.* at 11a. Finally, the court of appeals affirmed the district court's legal ruling that neither the City of Lorain nor the LPA had control over the breakwater or authority and responsibility for maintenance of the navigational aids. *Id.* at 11a-12a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of another court of appeals. Accordingly, the petition for a writ of certiorari should be denied.

1. Suits brought under the Federal Tort Claims Act (FTCA) are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). Prior to the amendment of the Suits in Admiralty Act (SAA) in 1960 to include matters that did not involve government vessels or cargo but would be within the admiralty jurisdiction if private parties were involved, the discretionary function exception had regularly been applied in FTCA cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957); *Kline* v. *United States*, 113 F. Supp. 298, 300 (S.D. Tex. 1953). There is no basis for concluding that Congress intended to remove the discretionary function exception—and *sub silentio*, to subject the government to new tort liability—when it transferred certain maritime tort actions from the FTCA to the SAA in 1960. Indeed, the legislative history demonstrates that the amendment was intended only to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims. See S. Rep. No. 1894, 86th Cong., 2d Sess. 6 (1960); see also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175 (1976) ("It

was the difficulty in determining the appropriate forum for a maritime claim against the United States that moved Congress to amend the Suits in Admiralty Act in 1960.").

Thus, although the SAA does not contain an express discretionary function exception, every circuit that has considered the question has concluded that the exception applies in suits brought under the Act.* As the Second Circuit has concluded, "[w]ere we to find the discretionary function exception not to be applicable to the SAA, we would subject 'all administrative and legislative decisions concerning the public interest in maritime matters . . . to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries * * *.' Such an outcome is intolerable under our constitutional system of separation of powers." *In re Joint E. & S. Dists. Asbestos Litig.*, 891 F.2d 31, 35 (2d Cir. 1989) (citations omitted).

Petitioners argue (Pet. 9-10) that the Fourth Circuit has held that the discretionary function exception does not apply to the SAA, and therefore is in

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* See *Chute* v. *United States*, 610 F.2d 7, 12-13 (1st Cir. 1979), cert. denied, 446 U.S. 936 (1980); *Sea-Land Service, Inc.* v. *United States*, 919 F.2d 888, 891 (3d Cir. 1990), cert. denied, 500 U.S. 941 (1991); *Wiggins* v. *United States*, 799 F.2d 962, 964 (5th Cir. 1986); *Gordon* v. *Lykes Bros. S.S. Inc.*, 835 F.2d 96, 98 (5th Cir.), cert. denied, 488 U.S. 825 (1988); *Gemp* v. *United States*, 684 F.2d 404, 408 (6th Cir. 1982); *Cassens* v. *St. Louis River Cruise Lines, Inc.*, 44 F.3d 508, 511 (7th Cir. 1995); *Earles* v. *United States*, 935 F.2d 1028, 1031-1032 (9th Cir. 1991); *United States Fire Ins. Co.* v. *United States*, 806 F.2d 1529, 1534-1535 (11th Cir. 1986); *Canadian Transp. Co.* v. *United States*, 663 F.2d 1081, 1085-1086 (D.C. Cir. 1980).

conflict with the other circuits. Although it is true that the Fourth Circuit at one time declined to follow the rule incorporating the discretionary function exception into the SAA, see *Lane* v. *United States*, 529 F.2d 175, 179 (4th Cir. 1975), the Fourth Circuit has subsequently upheld the application of the discretionary function under the SAA without reference to *Lane*. See, *e.g.*, *Faust* v. *South Carolina State Hwy. Dep't*, 721 F.2d 934, 938-939 (4th Cir. 1983), cert. denied, 467 U.S. 1226 (1984); *Tiffany* v. *United States*, 931 F.2d 271, 277 (4th Cir. 1991), cert. denied, 502 U.S. 1030 (1992). Given the current unanimity of the circuits on this issue, and the correctness of the ruling here, review is not warranted.

2. Petitioners contend that the Coast Guard's decision to place only two warning lights on the breakwater was not the type of decision that falls within the discretionary function exception. See Pet. 13-14 (discussing *Eklof Marine Corp.* v. *United States*, 762 F.2d 200 (2d Cir. 1985), and *Sutton* v. *Earles*, 26 F.3d 903 (9th Cir. 1994)). Neither case is apposite. As the court of appeals correctly held, those cases "address situations in which the Coast Guard decided to install a single buoy to mark an underwater obstruction, but the buoy was either misplaced or not properly maintained." Pet. App. 8a. Here, the Coast Guard placed two navigational aids on the breakwater, both of which were properly maintained. Moreover, unlike *Eklof*, this case arises under 14 U.S.C. 86, which empowers the Coast Guard to "mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters * * * in such manner and for so long as, [in the Commandant's] judgment, the needs of maritime navigation require." The court in *Eklof* observed

that, if that case had arisen under 14 U.S.C. 86, application of the discretionary function exception would be mandated. 762 F.2d at 204. Because the Coast Guard is charged with making a judgment about the manner in which an obstruction is to be treated for the protection of navigation, the decision to mark the breakwater with two lights clearly comes within the discretionary function exception.

In any event, even if the discretionary function exception did not apply here, petitioners still could not prevail in this lawsuit because any breach of the government's duty was not the proximate cause of the injuries to Dianna Lawson. The record reflects that David Lawson was operating his motorboat recklessly, and that his blood alcohol level was more than two-and-one-half times the legal limit. Petitioner David Lawson's condition was thus the likely proximate cause of the accident.

3. Petitioners maintain (Pet. 24-28) that both lower courts erred in holding that the Coast Guard—and not the City of Lorain or the LPA—had sole responsibility for maintenance of the breakwater. However, under 14 U.S.C. 2 and 81, the Coast Guard has sole responsibility for the breakwater. As the court of appeals correctly observed, if the City of Lorain or the LPA had sought to interfere with that authority, they would have become potentially liable for criminal penalties under 14 U.S.C. 83, which provides that "[n]o person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States," without authority from the Coast Guard. No permission was sought from the Coast Guard here, and the maintenance of

the breakwater therefore remained solely a federal function.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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